## APPENDIX

### Opinion of the Hearing Court

An attainder by verdict has marked defendants, D'Alba and Pepe, as violators within subdivisions 4, 5, and 6 of section 225 of the Education Law.

At the trial, the People had introduced extra-judicial confessions made by both defendants. The confessions were admitted in evidence subject to the objections of respective counsel.

The Appellate Division on appeal affirmed the judgment of conviction. The Court of Appeals on appeal has remitted the case to me as the trial judge for a hearing, in order to have me determine whether or not the confessions had been made voluntarily. In the meantime, final disposition of the appeal is being held in abeyance pending my reported findings.

At the mandated hearing before me, a number of witnesses testified regarding the circumstances enveloping the confessions, including the various statements made by defendants in response to questions put to them by different persons and at different times. When considered in a tout ensemble pattern (*Fikes* v. *Alabama,* 352 U. S. 191, 197), these sporadic statements, in my opinion, spell out voluntariness. My conclusions of fact explain why I take this view.

That part of the New York statute on confessions, which is relevant to the question in hand, reads (Code Cr. Pro., sec. 395):

> "'A confession of a defendant whether in the course of judicial proceedings or to a private person [People v. Popoff, 261 A. D. 788, 27 N. Y. S. 2d 825],

can be given in evidence against him, *unless made under the influence of fear produced by threats* * * *.'" (Emphasis supplied.)

The law of this State hails with favor a voluntary confession. It is acceptable not only as evidence but also as convincing proof. Such kind of proof is the best example of an inanimate voluntary witness. See Ballentine's Law Dictionary, p. 570. On the other hand, an involuntary confession, by its very nature, is evidence of nothing (*People* v. *Valletutti*, 297 N. Y. 226, 231), or, to say it in a different way, it is mere brutum fulmen.

A review of some of the outstanding authoritative book cases, should prove instructive.

A confession must be the voluntary product of a free and unconstrained will (*Haynes* v. *Washington*, 373 U. S. 503, 514). It must be, to put it in another way, the product of a rational and free will (*Blackburn* v. *Alabama*, 361 U. S. 199, 208). It must proceed from a meaningful act of volition (*Blackburn* v. *Alabama*, *supra*, 211). Convictions following the admission into evidence of confessions which are involuntary, i.e., the product, for instance, of coercion, either physical or psychological, cannot stand (*Rogers* v. *Richmond*, 365 U. S. 534, 540). A confession secured by the torture of the mind is just as contrary to inherent fairness of basic justice as torture of the body (*People* v. *Leyra*, 302 N. Y. 353, 98 N. E. 2d 553). However, a confession obtained by artifice or deception is admissible, unless the deceiving acts amount to deprivation of due process. *People* v. *Everett*, 10 N. Y. 2d 500, 225 N. Y. S. 2d 193.

*Appendix*

A denial of due process has been defined as the failure to "observe the fundamental fairness essential to the very concept of justice * * *. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict (*People* v. *Leyra, supra*). The trial judge should focus his attention on the question whether the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and to note whether they, by such means succeeded in bringing about confessions not freely self determined (*Rogers* v. *Richmond, supra,* at p. 54). The issue in each case resolves itself into the question whether a defendant's will was overborne at the time when he confessed (*Lynumn* v. *Illinois,* 372 U. S. 528, 534). Always the burden is on the People to prove voluntariness beyond a reasonable doubt. *People* v. *Huntley,* 15 N. Y. 2d 72.

All attendant circumstances should be examined in considering whether a confession was obtained by coercion or by improper inducement or by any other illegal method (*Haynes* v. *Washington, supra,* 373 U. S. 503, 513). A judgment must be based upon a consideration of the totality of the circumstances (*Fikes* v. *Alabama,* 352 U. S. 191, 197, *supra*). The barometer is the independence of will by a defendant (*Blackburn* v. *Alabama, supra,* 208). A defendant's character and background are highly material on the issue of voluntariness. *Fikes* v. *Alabama, supra,* 197.

## *Appendix*

### *Findings of Fact (D'Alba)*

For the detailed reasons accounting for my ruling against defendants, I submit the following findings of fact and conclusions of law:

(1) D'Alba is a mature, well educated, and an intelligent individual. He was a medical doctor in Italy.

(2) There is no contention that he was harmed or was threatened.

(3) He was not under arrest at any time during the discussions that tended to make up the extra-judicial confessions.

(4) He made no complaint of abuse to anyone until he testified at the trial.

(5) He signed a waiver of immunity and testified before the Grand Jury on the advice of counsel.

(6) He made no claim to the Grand Jury that he had been coerced.

(7) He repeated his confession to the District Attorney after being advised of his right to counsel and of the right to remain silent.

(8) There is no contention that he was coerced by the District Attorney.

(9) The fear that allegedly took D'Alba's mind prisoner was the fear of his co-conspirators not any fear of the authorities.

## *Appendix*

### *Findings of Fact (Pepe)*

(1) Defendant Pepe is a well educated man, a doctor by profession.

(2) He was not under arrest when he made his confessions.

(3) A confession was elicited as the result of a confrontation with Dr. Baviello on the porch outside Pepe's room.

(4) The only promise (and that was favorable) was made to him was that Picard, an investigator, would include in his report the fact that Pepe was cooperating.

(5) There is no evidence that he was actually harmed physically in any way or threatened with physical harm.

(6) Pepe appeared at the Department of Education six days after the first interrogation, on his own volition and there confirmed with greater detail what he had already said.

(7) He repeated his statement to the District Attorney on August 9, 1961. At that time he was advised of his right to remain silent, but instead, talked.

### *Conclusions of Law*

Included are both defendants:

(1) The extra-judicial confessions composed of sporadic statements were made by both defendants voluntarily.

(2) No public official or private person said or did anything, according to the original record, that could be said to cause a violation of section [3]95 of the Code of Criminal Procedure of this State.

(3) There was no denial of due process.

The long and short of this conspectus leads me to the resolution of denying these defendants any favorable opinion in regard to the challenge of their confessions; consequently, I recommend to the Court of Appeals, the findings of "voluntariness."

Dated, June 21, 1965.